

THE ROTTERDAM RULES. PRELUDE OR PREMONITION?

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Resumen: Este artículo ofrece un análisis general y preliminar sobre las Reglas de Rotterdam desde una perspectiva crítica en la que se destacan, por un lado, las novedades que introducen las Reglas de Rotterdam en la regulación marítima propiamente dicha y, por otro, su alcance parcialmente multimodal. El artículo se inserta en el marco de un movimiento de oposición a la entrada en vigor de las Reglas de Rotterdam, que ha empezado a tomar cuerpo tras la firma de este Convenio celebrada en septiembre de 2009 y ha reunido a su derredor a destacados maritimistas, académicos y profesionales, de todo el mundo, lo que anuncia un debate que, sin duda, redundará, en beneficio de la futura legislación del transporte marítimo y multimodal en el ámbito internacional.

Palabras clave: Transporte, Mercancías, Marítimo, Multimodal

Abstract: This article is aimed to offer a general and preliminary analysis of the Rotterdam Rules from a critical perspective outlining both their impact on the maritime regulation itself and their multimodal reach. The article must be read in the context of a opposition movement to the Rotterdam Rules born after the signature of this Convention in September 2009 and which has gathered around a number of leading shipping experts, both academic and practitioners, from all over the world, anticipating a debate which will surely benefit the future regulation of maritime and multimodal transport in the international arena.

Key words: Carriage, Goods, Maritime, Multimodal

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I. Introduction

1. The new UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea¹ has an unmerchantable title, so it will be rather called "The Rotterdam Rules" like its predecessors according to the place of the official signature.

2. At the present stage, almost more than a year gone since the Convention was finalized in New York, a number of articles and opinions have been published but not too many for the relevance

¹ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea adopted by the General Assembly on 11 December 2008. *A/RES/63/122* on 11 December 2008.

of the matter. Most of the releases are of a descriptive or illustrative kind only, while a few others went into some depth of analysis, though nearly all of them ran somewhat cautiously and reservedly before the Convention gains international force and it receives the test of the transport market, save a handful of position papers advanced by concerned organizations. There is a general feeling that anything one may say about such a long and complex piece of legislation at this early stage may sound to be adventurous or premonitory, and perhaps unwelcome by an expecting audience. An international debate, however, did not properly arise despite a loose number of contributions delivered at seminars, meetings and expert magazines during the 12 years of the lawmaking process. An interesting bibliography could be drawn up by listing international views on the forthcoming Convention, though significantly enough these had hardly an influence on the delegates attending the Working Group III regular sessions, where it soon transpired that they had a Convention to make and that the target was to complete it soon. The majority of the expert opinion in the world, with few exceptions, stands now sceptical but prudent enough not to fall into open criticism, which would otherwise seem to be not politically correct on the close aftermath of the signing ceremony which was held in Rotterdam on the 23rd September 2009.²

3. The Convention contains 18 Chapters and up to 96 Articles, so it is a long set of provisions but it does not mean it is, indeed, a comprehensive one. No voyage across its chapters may be of any usefulness unless we attempt to grasp the essence by addressing the very backbone of these new rules for the international carriage of goods. Then, we will refrain from entering into some areas of self-purpose or geared by a modernisation spirit (i.e., delivery of the goods, transport documents, electronic records, right of control and transfer of rights), which would deserve special attention elsewhere both on account of its novelty or of their implications to the trade.

4. In this essay the following matters will be examined:

- international purpose and subject-matter scope of application.
- the concept of multimodal transport introduced by the Convention.
- the definition and identification of the Carrier.
- the liability regime of the Carrier for loss, damage or delay.
- the Shipper's duties vis-à-vis the Carrier.
- mandatory and optional provisions in the Convention rules.
- the intended scope of application.
- the aimed uniformity and relations with other Conventions.
- jurisdictional, arbitral and procedural issues.
- the practical needs the Convention is to serve.

II. The International Purpose of the Convention.

5. The General Assembly believed that “the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets,”³ which will be seen as a political statement often common to diplomatic treaties but no more.

6. The focus on uniformity, and so the very objective of any reform, had been traditionally placed in the BILL OF LADING as a document of title for the transport of the goods by sea (thus, the Hague

² “Without doubt, as in any human effort, the text may create problems that we cannot now foresee. It would be imprudent to say that the cause of those effects is to be found in frivolous treatment, a lack of consideration of real problems, or in an absence of carefully drawn language”. D. MORÁN, “Ocean Carriers’ duty of care to cargo in port: the Rotterdam Rules of 2009”, *Fordham International Law Journal*, Volume 32, No. 4, April 2009.

³ *Idem*, p. 1

Rules⁴, the Visby Protocol⁵ and the Hamburg Rules⁶). The CMI in 1996⁷ adopted a wider approach to include those issues ancillary to the sea carriage of goods, arising during the transit or ashore, or in relation with the underlying contracts of sale and insurance and commenced a work taking the Hamburg Rules and the Hague-Visby Rules as basis for attaining an update overcoming both. The CMI did not have in mind at the outset a multimodal convention as such or a convention if at all⁸. The UNCITRAL opted for a more ambitious plan of reform with a focus on the CONTRACT OF CARRIAGE, which of course implied and required a careful architecture and not only another pair of glasses. Matters relating to freight, storage ashore, loading, stowage, discharge, delivery, relations with the Shipper, interplay with the underlying contract of sale, lien on the goods carried, change of voyage and change of the port of destination, etc., had dwelled outside the previous international law instruments in force. The contract of carriage does not of itself protect the rights and interests of the consignee, wherefore framing up a contract of carriage which should be both binding and equitable between the contracting parties and protective to the cargo receiver was a task lying ahead for the Working Group III. Soon after the sessional periods had been launched the chapter of “freight” was dropped entirely and others followed while the right of the parties to change the voyage was incorporated by a mechanism of “right of control”⁹ over the goods similar to the one used with Seaway Bills, but without first defining in the Convention the effects and consequences of amending the contract of carriage between all the parties affected and in relation to the contracts of sale and insurance¹⁰.

7. The result achieved by UNCITRAL in ruling over the “contract of carriage” is partial and limited. The aspects now regulated will be the obligations and liability of the Carrier, the period of liability of the Carrier, dangerous goods and sacrifice of the goods at sea, deviation, deck cargo, carriage preceding or subsequent to sea carriage, obligations and liability of the Shipper, transport documents and electronic transport records, delivery of the goods, transfer of rights and time for suit. Other contractual issues such as the calculation and payment of freight, the liability for delay in port and payment of demurrage, the right to lien the cargo, the assignment of the contract of carriage to another party, the liability for damage to the vessel arising out of defective stowage of the goods, claims by stevedores and

⁴ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924).

⁵ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels, 23 February 1968).

⁶ United Nations Convention on the Carriage of Goods by Sea, (Hamburg, 31 March).

⁷ “It is thought that the CMI should offer its cooperation to UNCITRAL and that areas which are worthy of investigation include the following:

Relationship between carriage of goods by sea and multimodal transport.

Transport documents.

Bankability of transport documents.

Relationship between contract of carriage and contract of sale of goods (whether and to which extent one may affect the other).

Contracts ancillary to the contracts of carriage such as forwarding contracts and contracts with terminal operators”. F. BERLINGIERI, “*Report of the Chairman of the ISC on uniformity of the Law of carriage of goods by Sea*”, 1996.

⁸ “It is therefore sufficient that CMI investigates whether by making provisions in the law of contract for carriage of goods by sea the position of the bank could be clarified on a uniform basis, without entering into the very difficult issues of transfer of ownership and creation of pledges on the goods. A study will have to be conducted with regard to the question of where and how liability of the shipper is (and should be) transferred to a subsequent holder of the document in the light of the current laws. The study will also have to answer the point of what part of the liability will remain with the shipper”. A. VON ZIEGLER, “*Report of the CMI Steering Committee on Issues of Transport Law*”, 1998.

⁹ “It must be noted that the UNCITRAL draft carefully restricts itself to provisions of transport law and does not extend to matters of sale or property law. However, it obviously take into account the fact that its transport law provisions have to function in conjunction with the law of sale and the law of property. As a result, the right of control is defined in such a way that the controlling party has similar control over the goods as the holder of a negotiable transport document under the present negotiable transport document practice”. G. J. VAN DER ZIEL, “The legal underpinning of “E –Commerce in Maritime Transport by the UNCITRAL Draft Instrument on the Carriage of Goods by Sea 2003” *CMI Yearbook*, 2003.

¹⁰ “The transfer of documents provisions of the CMI Draft Instrument on Transport Law 2002 are based on Anglo-American notions”. “Thus, the Draft instrument is silent on title and ties any independent characteristics exclusively to on-sale documents. Under such documents, a new holder assumes rights by transfer according to well-recognized methods but incurs liabilities only through the exercise of rights”. H. TIBERG, *Lloyd’s Maritime and Commercial Law Quarterly*, “Transfer of documents”. 03.02.2003.

terminal operators, performance of the contract, non-arrival of the vessel to the port of shipment, cancellation rights, frustration of the contract, terms and conditions relating to matters other than the care of the cargo, etc. up to a number of questions that would certainly arise within the frame of the contract of carriage but unrelatedly to the Bill of Lading or to the document of transport. The new scope of “contract of carriage” becomes limited and is subject to voluntary agreements, opting in and out, that may make it suitable to “volume contracts”¹¹ but not to “voyage charterparties”, which are substantially contracts for the carriage of goods nevertheless.

8. A composite of solutions have been brought into the Convention for attempting a partial regulation of the “contract of carriage” but often the logic and legal foundations of some provisions do not work together.

III. The Concept of Multimodal Transport Introduced by the Convention.

9. The contract contemplated by the Convention shall be “wholly” by sea and it is conceived to be a marine carriage in many occasions. It can be also (“partly”) a contract providing for carriage by other modes of transport in addition to the sea carriage. When it does, then the transport service embracing more than one mode shall be truly multimodal. However, one of the modes must be the marine carriage, for which reason the Convention is called “maritime plus or wet multimodal”. The ambit of application is thence limited to multimodal carriages ancillary to or in connection with the sea leg, which is unfortunate because other examples of multimodal services will be falling outside the Convention.¹² The UN Convention of 1980¹³ kept the scope much wider by defining “international multimodal transport” as a carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. With no leg excluded, the regulation could have addressed modern issues of multimodal services and interphase logistics, also dealing with the liability during port transit, since the ITO Convention 1991¹⁴ did not ever enter into force.

10. However, the UNCITRAL product afforded a pattern essentially “maritime” to any contract of carriage governed by it, whether multimodal or not, which would make certain provisions inadequate to multimodal services of today.¹⁵ Frameworking the liability for the container in a segmented fashion (network liability) causes the revival of the traditional problem of the localisation of the loss or the damage in one leg or another, which the new draft solves by applying a so-called “minimal network rule”, whereby the provisions of the Convention shall apply whenever no other modal international convention applies mandatorily and solely before loading the goods onto the ship or after their discharge from the

¹¹ “I doubt whether excluding volume contracts in the liner trade would have been controversial either, but the US wished to include them, at least insofar as they are service contracts within the definition in the US Shipping Acts, and then to include provisions whereby the parties to such contracts may derogate from the mandatory terms, and in certain cases bind third parties to such derogation”, “or maybe because where the US leads, the world tends to follow”. S. BEARE, “*Presentation to Cape Town Colloquium*”, February 2006.

¹² “There would be great possibilities to look at sea carriage rules from a fresh perspective. When this not happen, the question is what “fair” liability rules really mean. When is a new proposal better than the existing rules? The UNCITRAL Draft includes several rules which might create more problems than solve them. Any proposal should start from a port-to-port option, with separate ambitions to create a new multimodal Convention. Should a door-to-door option be the only alternative then the UNCITRAL Draft is too aggressive in case of unlocalized damage. Some independent liability rules would have to be created”. H. HONKA, “*The legislative future of Carriage of Goods by Sea. Could it not be the UNCITRAL Draft? An academic’s view*”, December 2002.

¹³ United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980).

¹⁴ United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, (Vienna, 19 April 1991).

¹⁵ “It is essentially a maritime transport instrument with some multimodal elements very half-heartedly bolted on without proper regard for the needs of land transport or of modern trade logistics”. EUROPEAN SHIPPERS COUNCIL (ESC), Position paper, April 2007.

ship.¹⁶ The conflictual panorama that may derive from a rule that involves a discussion over the actual place of the loss or damage can be easily imagined. By making these sort of repairs in the heart of the conflict between modal Conventions, the new rules enter into the shallow waters of liability by stages and take away predictability.¹⁷ It is therefore a limited concept of multimodalism, which poses more questions than it can answer, and loses a great opportunity¹⁸ for moving the world from 1980 forward to a modern regulation of the container transportation¹⁹ worldwide.

IV. The Definition and Identification of the Carrier.

11. The new rules provide (at Chapter 1, Article I.5) a rather simple concept of Carrier, namely, is a person who enters into a contract of carriage with a shipper, therefore a “contracting Carrier”. It does not cover, unlike the Hamburg Rules, the “actual Carrier” by means of the expression “by whom or in whose name a contract of carriage has been concluded with a Shipper”. Yet, the Convention adds the notions of “performing party” and “maritime performing party” in order to bring into the shape of the Carrier other persons who performs or undertake to perform any delegated function under the contract of carriage to the extent that such person acts, either directly or indirectly, at the Carrier’s request or under his supervision or control (performing parties); or other persons who performs or undertake to perform any of the Carrier’s obligations during the period between the arrival of the goods at the port of loading and their departure from the port of discharge (maritime performing parties). By means of such a double umbrella, though using peculiar language, all other persons to whom the contracting Carrier assigns the performance of a part of his duties, whether ashore, on board or at sea, may take his position provided that they do so at the Carrier’s request or under his supervision or control. Thus, any agent or subcontractor who undertake the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods would include ship agents, port operators, stevedores, trimmers, haulers, watchmen, port drivers, terminal operators, etc., provided that any of those acts for or serves the Carrier at his request or under his supervision or control. Of course, none of them are Carriers for the purposes of the contract of carriage but will be answerable for what they do in such capacity. It is most confusing that some of these subcontractors, agents or servants may be also “maritime performing parties” in reference of the period of contractual transit, whether it be wholly or partly by sea, wherefore an on carrying ship after transshipment may be an “actual Carrier” as much as it can be a terminal operator at the port of loading or at the port of discharge (but acting as agent for the Carrier). The addition of these figures breaks the traditional and well-established treatment of servants, agents and contractors of the Carrier, for whose acts or defaults he was to be responsible always. The Civil law concept of “culpa in vigilando et in eligendo”. The Convention changes course in order to allow tort actions directed against the “maritime performing parties” and their use of the defences available to the Carrier, and at Article 19 renders those persons who perform for or on behalf of Carrier during the contract transit period subject to the obligations and

¹⁶ “It thus seems that a network system of that sort is the best that can be achieved in this political climate, whatever the best system might be in the abstract. The goal here should therefore be to get as much uniformity as politically possible into a system that will, by definition, not be uniform”. M. STURLEY, *Draft report of the 5th meeting of the ISC on Issues of Transport Law*, London, 18 July 2001.

¹⁷ “The Association does not support two fundamental policy options: first –in itself commendable- freedom to opt out of the Convention, which is perceived as being defined too vaguely, and secondly, the Convention’s applicability to carriage other than sea carriage, the practical elaboration of which is seen as anomalous”. G. VAN DOOSSELAERE, (for the Belgian MLA). “*The Belgian position on the new Uncitral Convention*”. Position paper. October 2008.

¹⁸ “Overall, the new regime presents a curious mix of old and new”. “Nevertheless the Convention has some reactionary features and to some degree seems to represent a lost opportunity more radically to clarify and simplify the law. Temptations to litigation such as the possibility of breaking the limit of liability through proof of intentional or reckless conduct are retained. The unnecessarily complex scheme of liability is likely to generate much contentious debate. The documentation rules seem overly prescriptive and might safely have been much simplified. The hefty but incomplete foray into regulating multimodal transport is an unhelpful contribution to the development of satisfactory rules governing all types of modal combination”. D. GLASS, “A sea regime fit for the 21st century?”, *Shipping & Transport International*, Volume 7, no. 2, 2008.

¹⁹ “The container is in the base of the project: it is not about an adaptation of the text (of the Rotterdam rules) to the container but rather it is a text thought out and designed for the container”. R. ILLESCAS, “Project of UN Convention over the contract of international carriage of goods wholly or partly by sea”. *El Derecho de los Negocios*, issue no. 210, Madrid, March 2008, (translation).

liabilities imposed on the Carrier under the Convention, albeit with the entitlement to his defences, where the actual occurrence that caused the loss, damage or delay during the period and to the extent he was participating in the performance of any of the activities contemplated by the contract of carriage, that is, to the extent that he was “performing” in respect of the cause from which the claim originated.

12. The case of the “terminal operator” is one for hard-fitting into the Convention because is essentially an intermediary who will have dealings with the shipper or the liner carrier prior to or after the sea transport in regard to the stuffing/destuffing of containers, the land-side transport, the warehousing in the terminal, etc. What makes the situation quite complicated is the fact that the terminal operators act as agent both for the shipper and for the carrier. Furthermore, the international terminal operator may be engaged also by a forwarder, by the receiver of the unloaded cargo, by the groupage agent, by the Custom or Port Authority, by an individual depository and, indeed, by a non-liner multimodal operator.²⁰ The new rules shall be concerned with the cases in which the terminal operator performs any part of the Carrier’s duties acting as his agent. They do not regulate equally, if at all, the liability of the terminal operator whenever he is acting as agent of parties other than the Carrier. Presumably, in all of the circumstances the terminal operator shall be able to make use of the specific terms for storing goods in the terminal, but vis-à-vis the cargo interests reliance must be had to his defences under the Convention when he is undoubtedly to be held a “maritime performing party”. The Convention includes in the definition an inland Carrier who performs his services exclusively within a port area, but an inland on-carrying company may well store cargoes in terminals situated outside the port area, which is an arguable location concept always. Yet, where the terminal operator, happened to be a “maritime performing party” and is held by a Court award to be jointly liable with the Carrier, then the latter should be able to redress an action against the terminal operator for recovery of the sums paid by him, whether in full or for the part liability (i.e., concurrent causes leading to apportionment of fault), then the terminal operator may not be able to make use of the Convention’s defences vis-à-vis the Carrier under Article 19 but will have to rely on the terms of the warehousing contract. This problem was solved by the ITO Convention 1991²¹.

13. The Carrier and one or more maritime performing parties may be held joint and severally liable for the loss, damage or delay. A liability “in solidum” would be not be understood to arise in a context of delegation of functions by the Carrier. The construction would allow cargo claimants, and others, to sue one or more maritime performing parties (e.g., the ship agents, the stevedoring company and the crane driver) in tort, together or otherwise the Carrier in contract, for damage to the goods occurred during the unloading operations. While, it would have been far more simple and efficient to hold the Carrier liable in contract only for the damaged cargo and disallow tort actions against the subcontractors, however popular these may be in some countries.²² The Convention introduces multiple “part-Carriers” who can be sued not only in the jurisdiction of the port in which they performed their function but also in their place of domicile or residence, by effect of Article 68. The litigation menu for forum shoppers is ready. The second half of the device is the use of the defences available to the Carriers, which the Convention sets out under Article 17.3 through a list of some 15 groups of exculpatory causes, some of which pertain to the sphere of the Carrier only, and by an exercise of rewriting the “Himalaya Clause” of the English law into the provisions of the Convention, no matter the degree of fault, the application of the benefit to persons who acted under the control of the Carrier or at his request only and the cross-effect of the joint and several liabilities and above all no matter of whether the very fault or neglect of the subcontractor in the particular operational phase of the transit arose out of his employment, training

²⁰ We believe the changes in liability proposed by the draft Convention deserve specific consideration by Terminal Operators”. “The proposal by UNCITRAL would curtail the terminal operators’ freedom”. P. STÖCKLI (TT Club), *Club Release*, December 2008.

²¹ *Idem*, p. 4

²² “Shippers/consignees needed to pursue one single operator in the event of loss of, or damage to the goods involved in multimodal transport, who would be responsible for the overall transport, rather than against several unimodal carriers involved. There was a need for an international legal framework for multimodal transport of goods”. UNCTAD SECRETARIAT, “Implementation of Multimodal Transport Rules”, 25 June 2001.

or conditions of performance. The overall result would possible drive cargo lawyers into paradise for shaping up their recovery lawsuits.

14. The Carrier, where not identified by name in the transport document (in liner trades he normally is but not always), by effect of Article 37.2, the registered owner of the carrying ship will be presumed to be the Carrier. Such a presumption or prima facie case could be destroyed by the registered owner proving that the ship was under a bareboat charter at the time of the carriage providing his name and address, and likewise then the bareboat charterers might rebut the presumption by proving that some other party is the Carrier. This game of the “Carrier finding” may be of little use where the registered owner is a paper company only and no answer is provided, bearing in mind that shipping is a footloose international industry in which the majority of the companies have their assets registered off-shore. Then, the registered owner alone will not assist the claimant, who may well act to arrest the ship. It might have been perhaps more expeditious to have built up a presumption of Carrier against any person who, unless identified in the transport document, employs the ship with or without possession.

15. Alternatively, by leaving it up to the claimant to prove that the registered owner is not the Carrier. The overall design of the identity of the Carrier under the new Convention suggests a combination of case-by-case Carriers, many of whom are not party to the contract of carriage, which would probably incent tort actions to a larger extent because the registered ownership would not often open the gateway to the Carrier.

V. The Regime of the Carrier’s Liability.

16. The new regime brought by the Rotterdam Rules is not new, though presents a radical change in reference of the Hamburg Rules, inasmuch as it preserves a lot of substance of the Hague-Visby rules²³.

17. The period of responsibility of the Carrier as custodian of the goods begins when he or his servant, agents or subcontractors (performing parties) receives the goods for carriage and ends when the goods are delivered. This is an ample scope which trespasses the port limits and enables a regime door-to-door.²⁴

18. The Carrier has inherited from the Hague-Visby the catalogue of specific obligations, under Article 12, so as to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods²⁵, save as otherwise agreed with the Shipper or the consignee and stated in the contract particulars²⁶. The Carrier takes also on himself making and keeping the ship seaworthy before and during the entire voyage, manning the ship with a proper crew and equipping and supplying necessaries to the ship, making the holds and all other parts of the ship fit and safe for the reception, carriage and preservation of the goods, in other words, cargo worthy.

19. These basic duties of the Carrier should be of course always implied and in return of payment of a freight under any contract of carriage and do not add to the obligations that are presumed from any

²³ “About the only thing the Antwerp (ESC) Seminar agreed on was that the Rotterdam Rules are long and inelegantly drafted compared to the Hague-Visby Rules”. N. SMITH, “*Fairplay*” – Issue 6537, 25 June 2009.

²⁴ “It will be apparent that the aims of the CMI and UNCITRAL were much broader than the existing liability Conventions on carriage of good by sea. Indeed, initially, there was no indication that the project would embrace liability issues at all, but liability was included in 1999”. S. GIRVIN, “*Lloyd’s Maritime and Commercial law Quarterly*”, 1 October 2001.

²⁵ “It is disappointing that, despite positive indications in earlier discussions to the age-old problem of demands for delivery of cargo without surrender of a negotiable document the final version has been watered down”. D. CHARD, *BIMCO Bulletin*, volume 103, April 2008.

²⁶ It would be good to encourage commercial parties to clarify their contracts of carriage so that it would be possible to tell what obligations were being assumed. Commercial parties will probably not be influenced by what some body from afar tells them they should do by way of drawing up their contracts. There is no practical sanction that can be applied if the parties continue to produce unintelligible and incomplete documents”. A. DIAMOND, *3rd meeting of ISC on Issues of Transport Law*, CMI, New York, 7 July 2000.

decent Carrier. However, such obligations do not amount to a warranty but only lead to the exercise of due diligence, which is always a burden rather easy to discharge. There is perhaps of little use to the cargo owners that the Carrier should be supposed to keep his ship in a seaworthy condition during the voyage but at the same time that he could be required to do no more than exercising due diligence, which in respect of maintenance works will be most difficult to define and apply under every other circumstance. The catalogue of specific obligations would only add to the Carrier's frame of liability where those should be obligations of guarantee or of presumed fault (as under the Hamburg Rules).

20. Article 17 establishes the Carrier's liability for loss of or damage to the goods, as well as for delay in delivery, on basis of fault only which is not presumed but will be excused under a number of cases (altogether more than 40 exculpatory causes). For the Carrier to be liable under the new rules the following burden of proof must be discharged²⁷:

- the claimant must first prove the location of the loss or the damage and that the Convention shall apply, upon which

- the claimant must prove that the loss, damage, or delay took place during the period of the Carrier's responsibility under the Convention. It would not be enough to prove the loss or damage at the time of collection of the cargo.

- then, the Carrier may prove that the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault of any performing party for whose acts he must respond. The proof of no-fault is related to the cause or, in the event of concurrent causes, to only one of them. As long discussions may come about what or which were the causes of the loss, damage or delay, the Carrier may always be relieved from liability by merely proving one or more of the stated events of exculpatory kind in the alternative. Then, the Carrier instead of proving the cause and the absence of fault in respect thereof he can prove one of up to some 40 exceptions as causes or just contributory causes to the loss or damage giving rise to the claim (e.g., perils, dangers and accidents of the seas). Some of the listed events do no longer belong to the XXI century. It is noteworthy remarking here that the old exception of "fault in navigation or in the management of the ship" has been removed and this alone has been broadly taken as a major concession to the cargo interests under the Rotterdam Rules.

- then, however, the cargo claimant may prove that the Carrier is liable because he was at fault in respect of the event or relieving circumstance he relies on, or as well the claimant may prove that the cause did not flow from any of the long list of exculpatory events but from another, in respect of which the Carrier cannot discharge his fault either.

- then, the claimant may alternatively avoid the long list of the Carrier's exculpatory causes by proving that the cause, or contribution thereto, was the unseaworthiness of the ship, or the improper crewing, equipping or supplying of the ship or the uncargoworthiness in respect of the conditions of the holds or of any containers supplied by the Carrier.

- then, the Carrier may prove that none of these events (e.g., unseaworthiness) were causative to the loss or damage or delay, or

- then, the Carrier may still prove that he exercised due diligence in respect of the obligation concerned, which in fact allows the exception of "fault in navigation" to return for relieving his liability in relation to an "obligation of moyen".

21. Bearing additionally in mind that where the Carrier is relieved of part of his liability by virtue of one of the listed exceptions then he will be only liable for the other part for which he is effectively liable or not excused, whereby the Courts will have a important task of apportioning fault in respect of each single accident.

22. As may be seen, besides the liability for delay, very little is new since 1924 under the Rotterdam Rules.

²⁷ "ECSA firmly believes that the Rotterdam Rules provide for the necessary legal certainty and uniformity with regard to cargo liability". EUROPEAN COMMUNITY SHIPOWNERS ASSOCIATION (ECSA), "ECSA backs Rotterdam Rules", press release, June 2009.

23. The way the burden of proof is to operate favours the Carrier considerably by shifting to the claimant in order to prove his fault beyond a large number of excepted perils or, eventually, beyond due diligence²⁸. The rules on limitation of the Carrier's liability (Articles 59-61) are probably the most disappointing section in the body of the Convention. Limits set at 875 units of account per package or 3 units (SDR) per kg. of gross weight of the goods, whichever is the higher, and 2.5 times the freight payable on the goods delayed, are low having regard to the economical conditions prevailing at 2011/2012 and compared to the higher limits under the Multimodal Convention fixed in 1980 (SDR 925). Adding to it the toughest rule ever on loss of the benefit of limitation, which requires the claimant to prove not only personal act or omission of the Carrier but also an intentional action or reckless but with knowledge that the loss would result, would possibly turn the right of limitation undisputed. This protracted language, which poses conflict of interpretation under Common and Civil laws, is surprisingly preserved at modern times in which breaches of safety laws and of regulatory standards (ISM²⁹, ISPS³⁰, SOLAS³¹, STCW³² Conventions) should be sufficient for rendering a vessel unsafe and unseaworthy, which would not seem to be much in consistency with the utmost protection of the right to limit under the new Convention.

24. This Chapter, like in every transport liability regime, is the axis of the Convention and the new regime appears to be unbalanced and very complex for the Courts of Justice to determine upon.

VI. The Shipper's Duties vis-à-vis the Carrier.

25. The Convention introduces two "shippers", namely, the person who enters into a contract of carriage with the Carrier and the person, other than the former, who accepts to be named as "shipper" in the transport document or electronic transport record, whom will be called "documentary shipper", mostly so to provide for freight forwarding operations.

26. A full Chapter 7 is devoted to the "shipper" in the new rules, which will be seen as an important turn in the history of the international marine carriage law. Indeed, under the Hague-Visby and Hamburg rules the role of the Shipper was one of guarantor of the accuracy of the information over the goods supplied to the Carrier for transportation. The Shipper supplied the necessary details on the cargo for issuing and signing the B/L. His duties and liabilities related to such a function of guarantee. Both previous law instruments established that the Shipper was deemed to guarantee the accuracy of the statements as to weight and quantity of the cargo and he was to indemnify the Carrier for loss resulting from his errors. While the traditional approach was about regulating the carriage of goods by sea under B/L only, the Convention adopts a general view of the contract of carriage, though limiting the position of the Shipper to the performance of certain obligations toward the Carrier under no equal contract footing. Through seven articles, the "Shipper" is conceived to bear a heavier onus operandi than in the past.

27. Thus, the Shipper must deliver the goods ready for carriage and always in such a condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property. Unless agreed otherwise in the contract, that is the general pattern of the Shipper's duties in respect of the cargo. All of the items of performance now envisaged do not belong to the Shipper's sphere of business and, particularly, in the liner trade are common to the Carrier's functions as custodian of the cargo and performer of the carriage.

²⁸ "This just goes to show that a failure to reach consensus among different trade interests and other organizations on the content of the Rotterdam Rules, and the complexity of them will most likely result in a number of potential multimodal variants being developed around the work and not just by the European Union". N. VAN DER JAGT, European Shippers Council (reported by American Shipper's California Pacific Connection), June 2009.

²⁹ International Safety Management Code.

³⁰ International Ship and Port Facility Security Code.

³¹ International Convention for the Safety of Life at Sea (SOLAS), 1974. Adoption 1 November 1974. Entry into force: 25 May 1980.

³² Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 as amended in 1995 and 1997.

Then, the specific type of the natural shipper's role is about information and instructions with regard to the goods (Article 29). From a general scope the Shipper bears an obligation to provide, in time, the information necessary for the proper handling and carriage of the goods, including precautions, and for the Carrier to comply with regulatory duties in respect of the intended carriage and the particular cargo. This general duty is not strict or absolute because the Shipper shall discharge it when the information is not "reasonably available" to the Carrier (through its own agents, Liner trade), and also where "reasonably necessary" and upon timely notice from the Carrier that regulatory compliance is required. However, there is an obligation of guarantee in the part of the Shipper in respect of the accuracy of the specific information required for the compilation of the contract particulars and the issuance of the transport documents, and in respect of the carriage of dangerous goods also. This specific duty is to be strictly discharged and was present in the previous cargo Conventions.

28. The Shipper shall be liable to the Carrier (Article 30) for loss or damage sustained by the Carrier if he proves that such loss or damage was caused by a breach of the shipper's obligations under the Convention. General or specific breaches? In that relates to his general obligation, the Shipper's liability is based in fault so that he can escape liability, or part of it, where he proves that the cause or one of the causes of the loss or damage is not attributable to his fault. An example could be a leaking container or a defective pallet. Yet, in the cases of specific information for compilation and issuance of the transport documents and also in respect of marking or labelling dangerous goods his liability shall be absolute and independent of fault, and he shall indemnify the Carrier for loss or damage resulting from his breach of the guarantee on accuracy of the information. Since these are important particulars to be relied upon by the Carrier and by third parties including the cargo receivers and port authorities, it is understandable that the Shipper's obligation must be strict because there is a principle of safe trading involved. However, and by virtue of Convention's focus on the contract of carriage rather than on the carriage itself, the Shipper's should have been granted a right of listed exculpatory exceptions and of limitation (because the Carrier's loss may be often an economical or consequential one) in respect of his general obligation under Articles 27, 28, 29 and 32 (a) in order to strike a balance as it comes to compare the Carrier's and the Shippers' patterns of liability under the Convention.³³

29. The Shipper, where his functions are performed by agents, employees, etc., shall remain responsible for their acts or omissions. There is a dividing line between the subcontractors entrusted by him or by the Carrier, though a port terminal operator engaged by the Shipper (independent contractor) may not fall within an "entrustment" rule but within the mere ambit of service request. Unlike the Hamburg Rules, the Convention does not regulate the liability of the Shipper's employees, agents and subcontractor themselves vis-à-vis the Carrier and other third parties; since they shall be exposed to tort actions, maybe it would have been wiser to have avoided the application or reference to the domestic laws.

VII. Mandatory and Optional Provisions in the Convention.

30. Are the Rotterdam Rules mandatory? The question is asked and is answered in the affirmative by some of its fathers. The Convention, however, does not respond to the international character of "mandatory law" as a whole as it can be departed from or, indeed, excluded and included at the option of the parties to the contract of carriage. The notion of mandatory law of rules that are binding "iure et de iure" is well known to Civil law countries, and it may be said that an international treaty is essentially meant to be always mandatory and of binding force. Both the Hague-Visby Rules and the Hamburg Rules were "ius imperii", prevailing over any contractual clause contrary to their provisions, by effect of Art. 3(8) and Art. 23 respectively.

31. The new Convention contains a similar provision, at Article 79, which would make its rules mandatory except where the Convention provides it is not mandatory, which means "partly mandatory" only. The three, but not all, type of contract clauses to be voided shall be the following:

³³ "Contracts in the liner trade are less apt to be individually negotiated because form contracts (such as bills of lading and sea waybills) are the norm, and it has generally been assumed that an equality of bargaining power between the shipper and the carrier is less common in the liner trade". M. STURLEY, "Solving the scope-of-application puzzle" (CMI), 2004.

A) Those directly or indirectly excluding or diminishing the obligations of the Carrier or a maritime performing party under the Convention; but such obligations relate to the period of responsibility (from reception of the goods to delivery) while the Convention rules must give way to any other Convention where the loss, damage or delay took place during the periods prior to loading or subsequent to discharge to which such other Convention shall be compulsorily applicable under stated circumstances (then, e.g., stowage and conveyance within a carriage preceding or subsequent to the sea carriage); and subject always to special agreement with the Shipper or Consignee regarding port cargo operations (FIOS terms). Thus, the obligations set out by the Convention may be varied and fall out of the application scope.

B) Those directly or indirectly excluding or diminishing the liability of the Carrier or a maritime performing party for breach of an obligation under the Convention; in addition to non-application to the stages before loading and after discharge as said earlier, it must be born in mind that the liability of the Carrier under Chapter 5 is conceived in a rather loose and permissive fashion in respect of seaworthiness, crewing, equipping, supplying and fitting the holds or any containers supplied by him, it being engageable on basis of due diligence only, and as a result, e.g., clauses to the effect that the Carrier is not responsible for, e.g., failure of the reefer plant or the defreezing equipment on board may be potentially feasible under a frame of due diligence.

C) Assigning a benefit of insurance of the goods in favour of the Carrier.

32. The prohibition of contract terms extends itself, further, to the obligations and liabilities of the Shipper, consignee, controlling party, holder of the transport document or electronic record or documentary shipper, though it goes on to include “the increase” in respect of these alone, thus aiming to protect them against special terms imposable by the Carrier.

33. On the above conditions the Convention rules shall be of compulsory effect.

34. Nevertheless, the Carrier and the Shipper may agree special rules (opting out) in respect of VOLUME CONTRACTS (of large use in the US trades) providing for greater or lesser rights, obligations and liabilities than those imposed by the Convention and of course permitting protective clauses of any kind.³⁴

35. Also special rules may be introduced in the contract for the carriage of LIVE ANIMALS AND OTHER GOODS OF SPECIAL CHARACTER OR CONDITION excluding or limiting the obligations or the liability of the Carrier and the maritime performing party otherwise than as provided by the Convention (at Article 79).

36. Another exception is that, pursuant to Article 12.3, the parties shall be free to agree on the time and location of receipt and delivery of the goods³⁵, though provided that the receipt is not after the commencement of loading the goods on board and the delivery is before their final discharge. Since the contract of carriage may provide for carriage of the goods by other transport modes in addition to the sea carriage, the parties shall be able to agree the time and location of receipt and delivery of the goods as they may wish during the non-marine leg of the carriage, so the Carrier’s period of responsibility shall be then defined by the parties and the rules of the Convention may not apply in respect of loss or damage occurring before loading and after discharge phases³⁶.

³⁴ “However, contrary to Article III, rule 8 of the Hague Rules, a carrier doing business with a regular shipper under a so called “volume contract” would be able to contract out of most of the obligations and, for example, fix a very low package limit”. T. GRAHAM and F. GAVIN, “*Ince & Co. Shipping Update*”, May 2009.

³⁵ G. VAN DER ZIEL, “*Delivery marks the end of the Carrier’s responsibility*”, “Delivery to the Consignee” – Chapter 10, 2003.

³⁶ “In some instances there is a commercial need for cargo interests to be able to agree with the Carrier on variations of the contract of carriage and the question is who has that right. Another question is whether such a right may be transferred during the time when the goods are in the custody of the Carrier”. K.J. GOMBRII, *Background Paper on Right of Control*, 2003.

37. The loading or unloading operations may be agreed to be performed by the Shipper (free in out stowed), in which case the agreement may include provisions relieving the Carrier's of obligations ex-ship in connection with those operations. The Carrier shall be able to reject liability under Article 17.3(h). That agreement may be another way for opting out of the Convention rules. This specific exemption of liability does not exist under the Hague-Visby rules or the Hamburg Rules, and insofar as it does not derive from an act or omission of the Shipper on the accuracy of the goods particulars but lives within the framework of a contractual agreement, which is optional, it can be said that the performance by the Shipper of the loading or unloading operations should not relieve the Carrier from his obligations on board in connection with them, e.g., watching, crew assistance, officers' instructions, Master's orders in relation to stability and protection of other cargoes, etc., etc., because the specific obligations under Article 14 must be binding on the Carrier during the performance of the loading and unloading operations permanently, even where these are agreed to be performed by the Shipper or the consignee.

38. In that refers to DECK CARGO the Carrier shall not be liable for loss or damage to the goods so carried when the carriage on deck was agreed in the contract or was in accordance with the customs of the trade, provided that the deck carriage it is stated in the contract particulars; this is another option out.

39. The case of DEVIATION is one of some concern because in liner trades the Carrier invariably reserves for himself a "liberty of deviation" clause due to the need for altering the ports along the route that it often arises. Deviation is commonly excused when it is made for attempting salvage of life or property at sea, as was established by the Hague Rules in 1924. The solution given by the new rules is odd by referring, in the first place, to the "applicable law" (there should be no other than the Convention itself), then alerting as to the "deviation of itself" (what matters always is the consequence of deviating) and lastly allowing the Carrier to relieve himself from liability and otherwise to limit such liability provided that the deviation did not result from his personal act committed with the intention to cause the loss or recklessly and with knowledge that such loss would probably result. It is an unbreakable test. Deviation clauses and diverting orders shall be permitted by the Convention, which constitutes another important option out.

40. Then, the list of exceptions would show that the Convention is mandatory in part only, leaving aside the optional Chapters 14 and 15 relating to jurisdiction and arbitration.

VIII. The Intended Scope of Application.

41. The scope of the Convention's application is essential for weighing its potential ruling power and testing its major purpose of international uniformity. It is also relevant for assessing the ultimate balance of risk sharing between the parties.³⁷

42. As it regards the space (territorial ambit), the Convention shall widely apply to carriages between two different States where according to the contract either the place of receipt of the goods, the port of loading, the place of delivery or the port of discharge is located in a Contracting State. The flag of the vessel, the nationality of the Carrier, of the performing parties, the Shipper, the consignee or any other do not matter.

43. As regards the transport of goods (subject-matter application), the Convention shall apply to contracts of carriage, providing for carriage by sea and also occasionally for carriage by other modes of transport in addition to sea carriage. It does not apply to multimodal transportation not involving a

³⁷ "On the scope there is no clear view at present of what kind of Convention we are going to have. If it is door to door many options can be undertaken regarding the network and uniform system". J. M. MORINIÈRE, "Report to the IMMTA on the London meeting on the Transport Instrument", March 2003.

sea leg.³⁸ It does not either apply to loss or damage or delay localized in stages preceding loading and subsequent to discharge from the ship to which other international instruments would at the time of the incident apply mandatorily and wholly to all of the Carriers' activities governing its liability, limitation and time for suit, i.e., a modal Convention in force with application to such period. Then, there may be cases where the Convention shall not apply to such other modes that in addition to the sea leg were agreed under the contract of carriage. The Convention rules shall apply to liner trades upfront only, though even in the liner trades it shall not apply to Charterparties and contracts for the use of a ship or of any space on board the ship (slot trade). It applies, nonetheless, to non-liner (tramp) services when there is no charterparty or other booking between the parties and a transport document or an electronic record is issued, in other more simple words, only where the tramp vessel issues bills of lading uncovered by and not pursuant to a charterparty or to a booking agreement. The sphere of application and use of the new Convention is the liner transport primarily and also the non-liner services, unlicensed or non-regular, used by small or middle Carriers in the coastal trade or short-distance sea motorways. The Convention may be also made applicable by agreement (opting in) between parties (carrier, consignee, holder of the document of transport) who are not the original parties to a charterparty or to an agreement for the use of a ship or of part of her carrying capacity, which would embrace all those who are interested in contracting door-to-door transportation services with forwarders irrespectively of the contractual arrangements that the sea Carrier may have for the use of the ship or of part of her carrying capacity with another party. The commercial scope is then wider that may be thought of. However, it is regretted that Charterparties, which in their voyage form are fundamentally contracts of carriage, may have been deleted without at least the traditional inclusion of the cases in which a bill of lading, a document of transport or an electronic record is issued under and pursuant to a Charterparty but the holder is not the Charterer and the document alone governs the relationship between such holder and the Carrier (Hague-Visby and Hamburg Rules). In many of the voyage charters such may be the case as the holder is not the Charterer and the Charterparty terms are not, validly or at all, incorporated into the bills of lading. Certainly, that is the most common case with bills of lading issued under a Time Charterparty, by virtue of which the time-charterer acts as Carrier and issues, in liner trades more than often so, a document of transport to the Shipper or holder. The excluding rule at Article 6 is perhaps too restrictive and bans Charterparties unnecessarily. Last, the application of the new rules to Volume Contracts is made optional with a view to derogating from any mandatory force in the Convention, which means in practice that a considerable quantity of goods that may be carried by ships operating on a regular schedule will be falling out of the provisions of the Convention.

44. All in all, the scope of application to multimodal transports shall be uncomplete³⁹ and unsuitable and its application to door-to-door services shall be subject to a number of legal restrictions with commercial effect, while the carriage of goods by sea shall be the most benefited leg, albeit under a shorter extent of enforceability than the Hague-Visby and the Hamburg Rules.

IX. The Goal as to Uniformity and Relations with other Conventions.

45. The UN Assembly Resolution of the 11th December 2008 spoke of "the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg" to express a paramount goal for making a new Convention in the field of transport law.

³⁸ "It is also likely that the adoption of the UNCITRAL Convention would prevent any new attempt by other international organizations to prepare a suitable convention for multimodal transport. This could have been a good opportunity for UNCITRAL to prepare a modern, balanced and widely acceptable transport convention to apply to all international transport contracts irrespectively of mode of transportation". M. FAGHFOURI, *IMMTA Newsletter*, August 2008.

³⁹ "The Instrument is to be a Multipurpose Convention, but the ambitious project is a long way from completion. This is because each of the component parts -multimodal liability, transport documents, liens, delivery, right of control, negotiability, rights of suit- are in themselves complicated and demanding international conventions, waiting to be drafted and then adopted. Is expecting to draft the various components into one international Convention, not expecting too much at this time?" W. TETLEY, "Observations re CMI ISC meeting London 16, 17 and 18 July 2001" 14 August 2001.

46. The Rotterdam Rules, at Article 2 using a similar fashion to Art. 3 of the Hamburg Rules, command that in the interpretation of the Convention “regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade”. The pillar of the Convention is therefore the promotion of international uniformity of legislation in the middle of an era of growing dissemination of regional and domestic rules and lack of uniformity in the particular field (the Hague-Visby Rules, the Hamburg Rules, the ICC-UNCTAD rules for Multimodal Transport Documents, the Budapest Convention on the Contract for the Carriage of Goods in Inland Navigation and the UN Convention on International Multimodal Transport of Goods, irrespectively of their entry into force⁴⁰) largely caused by the even process of ratification by the States of the Visby Protocol, the SDR Protocol to the Hague-Visby Rules and of the Hamburg Rules. The spread of liability regimes in the sea carriage of goods is patent as data on surveys regularly published will show. Then, the target of uniformity has all merits and responds to the international mission of the CMI, whose role and performance in the making of the new Convention must be appreciated and acknowledged, by the shipping community as a whole⁴¹.

47. The new rules may hardly achieve such desired international uniformity, and at any rate to any level greater than the Hague-Visby Rules have achieved to date.⁴²

48. In the first place, there shall be no conflict, though no unification either, with the other international unimodal Conventions in force (air, road, railways and inland waterways instruments) and the new Convention shall not prevail whenever the loss, damage or delay takes place during a stage prior to the loading of the goods into the ship or subsequent to their discharge to which another modal Convention (e.g., Convention on the Contract for the International Carriage of Goods by Road, United Nations, Geneva, 19 May 1956-CMR) shall apply with a mandatory and full effect (Articles 82 and 26). The Convention may not either apply to Volume Contracts and to non-liner trade unless a transport document or electronic transport record is issued and there is no charterparty or similar booking fixture for cargo space. The Convention shall not apply to door-to-door transport service where there is no sea leg involved, thus excluding other forms of multimodalism.

49. The above limitation in its scope of application may not work towards uniformity, save in what touches the marine carriage alone.⁴³

50. Besides, it must be noteworthy that:

- the new rules are extremely complex and have no easy language, while simplicity and straight

⁴⁰ “The existence of several regulatory instruments that are applicable to the same business-like activity is already a serious problem, but moreover is a matter of concern that such instruments may present significant discrepancies over relevant issues such as the criteria for their respective scope of application and, in particular, for the liability regime of the marine carrier of goods”. C. LLORENTE, “New rules for the international sea carriage: Déjà vu?”, *Legal Today.com*, April 2008.

⁴¹ “It would be nice to think that this effort would receive universal support and that, in the meantime, national governments would refrain from devising their own national or regional solutions”, P. GRIGGS, Ince & Co. Maritime and Transport Law, IBA Section on Business Law, Maritime and Transport Law, IBA Section on Business Law, *Newsletter*, February 2000.

⁴² Few would deny the need for reform but whether the proposed Rotterdam Rules show the way forward must be doubtful. The lessons of history appear not have been digested”. “It nothing else it reveals a commercial world broadly content with the philosophy of the Hague regime and resistant to radical change”. R. THOMAS, “And then there were the Rotterdam Rules”, *Journal of International Maritime Law*, November 2008.

⁴³ “Submittedly, a worthy regulation of Multimodal Transport services must have the following characteristics:

- it must govern door-to-door transportation of goods under every form of intermodality, no matter the modes involved.
- it must provide a uniform regime of the Carrier’s liability from one end to another and no deviation according to the stages in the transportation chain.
- it must be a mandatory law of clear binding effect.
- it must provide a neat risk distribution system, so that insurance can be obtained in the market.

These issues, and other collateral to them, have not been resolved yet neither placed into a consolidated and single frame of law”. J.M. ALCÁNTARA, “Multimodal Transport in search of an International Regulation”, Conference on “Logistics/Transport Middle East 2008”, Royal Cultural Center, Amman , Jordan, 20-22 May 2008.

understanding are basic for uniformity of rules of law.⁴⁴

- they introduce new features like the electronic transport records, the right of control over the goods in transit and the variations to the contract of carriage, the transfer of rights under electronic transport records,⁴⁵ the enlargement of the Shipper's obligations and liabilities, the extraordinary powers afforded to the Carrier for disposing of undelivered cargo, including the private sale and destruction, the concepts of "performing party", "maritime performing party" and "controlling party", and the reference to Volume Contracts.

- they provide a pattern of the Carrier's liability entirely afresh, which combines a lot but not all with the regime under the Hague-Visby and differs radically from the Hamburg Rules and the Multimodal Convention. Although based in fault and approaching patterns under other modal Conventions, it does not serve to consolidate a grand unified theory among air, road, railways, inland waterways and sea carriage international liability regimes.⁴⁶ The new regime of the Carrier's liability is unbalanced as against the cargo interests⁴⁷, keeps a long list of exculpatory causes that lacks modernity and updating to the century⁴⁸, and builds up a system over the burden of proof that shifts conveniently to the Carrier to end up with due diligence reliefs in matters of such a crucial importance nowadays like seaworthiness of the ship, at times of international action against sub-standard ships. Together with the rather low limits adopted, which do not either respond to the century, the new regime may be seen too protective of the interests of Carriers, unbalanced and exceedingly tiresome for the cargo claimant in the task of discharging the onus of proof.⁴⁹

51. At Article 89, the Convention shall make State having adopted the Hague-Visby Rules or the Hamburg Rules denounce them if they ratify the new Convention and Article 90 no reservations are permitted. These provisions are positive steps, together with the requisite of 20 States only for gaining international force, toward uniformity since dual regimes shall be avoided in countries which adopts the new Convention but do not write off the Hague-Visby Rules, if they are a party, with immediate effect.

52. The process or the road to uniformity shall not be guaranteed or shall not be otherwise expected soon because of the too many different and non-unifying legal criteria that the new Convention brings along to the market, which shall need first read carefully what is excluded and what is not for making any practical assessment of suitability.

⁴⁴ "Both in text and structure the Draft instrument (on Transport Law) is unnecessarily complex and confusing. Unfortunately, little consideration appears to have been given to the need to ensure that internationally uniform rules are easy to understand and apply. Many of the provisions are complicated, with extensive cross-referencing. Their understanding requires considerable legal expertise and often the proposed wording leaves much scope for interpretation". UNCTAD SECRETARIAT'S *comments on the Draft Instrument on Transport Law*, 2002.

⁴⁵ "Finally, since the intention of the CMI is to create a new regime that will suit all parties to the transport contract, we respectfully submit that the CMI should draft a new Article mandating the shipper to notify the consignee or receiver or notify party of the terms and conditions under which the goods are to be carried before issuing the transport document or before the creation of any charterparty that would govern the transport document". THE NIGERIAN MLA, Bordeaux Colloquium, June 2003.

⁴⁶ "It has been a major point in the drafting of the Rotterdam Rules that they shall extend to door to door transport. It has, however, proven difficult to extend a Maritime Convention to land. First, the resulting regimes are complicated and undesirable from a policy point of view. Second, there are remaining, unresolved conflicts with unimodal transport Conventions that cannot easily be ignored. The attempt to resolve conflicts in the conventions leave a motley image, and are to some extent unsuccessful". E. ROSAEG, "*Conflicts of Conventions in the Rotterdam Rules*", paper presented at the 3rd Arab Conference for Commercial and Maritime Law in Alexandria, April 2009.

⁴⁷ "The changed balance of the new Convention now leaves more issues to freedom of contract, a situation that the current Law had tried to move away from. Although some large shippers or break bulk cargo owners may have the bargaining power to negotiate favourable terms, the majority of small and medium sized shippers will be disadvantaged having to accept the terms of the Carriers, probably at an increased risk or cost to themselves. This greater risk of shipping goods, transforms into higher insurance, therefore greater costs of good". A. PARKER, "*The Rotterdam Rules: a step backwards for Australian shippers?*", Logistic Association of Australia Ltd., 2009.

⁴⁸ "The list of defences presently found in the Hague and Hague-Visby Rules is for the most part left intact", V. M. DE ORCHIS, "*Client Alert!*", July 2004.

⁴⁹ "The skeleton of the new rules is Hamburg-made but the flesh is all Hague-Visby". "With regard to the allocation of fault between the parties, the new Convention stems away from the modern doctrines on strict liability or on presumed fault". E. CORNEJO FULLER, "*The legal evolution of the contract of carriage of goods by sea in the history*", IIDM XIII Conference, Montevideo, November 2008, (translation).

X. Jurisdictional, Arbitral and Procedural Issues.

53. The test of the Convention rules by the Courts of Justice and by arbitrators is not to come in the short run, no lesser than some 5 years after their entry into international force⁵⁰ and what we can advance at present may be premature and foresight only. However, this aspect is by far the most important to any international convention and must be constantly in the minds of the lawmakers. Because a Convention, the more so one seeking uniformity, shall be successful if it can perform well in the Courts and becomes workable and acceptable to judges and arbitrators, who after all shall be the interpreters of the Convention through their awards.

54. It is always hoped that what they finally say and adjudicate match with what is written in the provisions of the Convention and that they deliver findings to the market which as near as possible shall mean what the Convention says. We must therefore look thoroughly to how is the Convention designed to play before Courts and tribunals composed of laymen who do not have to be familiar with it, at least not before it becomes law. Out of estimate flowing from the experience in marine process and arbitration one can reread the Convention rules with a litigant magnifying glass and not without that sinking feeling that legal battles on disputes over the application, interpretation and enforcement of international maritime conventions is likely to provoke nearly always in the writer.⁵¹

55. The Rotterdam Rules contain 7 provisions relating to Jurisdiction and 4 to Arbitration (Chapters 14 and 15 respectively), though all of these rules are optional for the Contracting States that make a diplomatic “declaration” that they accept to be bound by them (opting in). The States which sign, ratify, adhere to, or accede to the Convention shall be able to adopt the Convention with or without Chapters 14 and 15 or one of them only. In principle and unless a “declaration” is made, at any time, by the Contracting State these provisions shall not be binding in that State; the “declaration” may be withdrawn also at any time thereafter (Article 91). Thence, it must be inferred that the uniformity to be sought by the Rotterdam Rules do not include the matters of Jurisdiction and Arbitration, for which reason the uniformity goal did not refer to these issues earlier in this essay since it was handled as a “de minimis” project.

56. The Hamburg Rules, at Articles 21 and 22, provided rules on Jurisdiction and Arbitration for the first time in the international maritime arena, as the Hague-Visby were silent.

57. The new Convention makes a complex but complete proposal along the following lines:

- an agreement over an exclusive choice of Court shall always prevail, though if contained in the contract of carriage and between the parties only. For actions against the Carrier only. It is a general case that most of the Liners forms contain a clause to this effect.

- in the absence of the above exclusive jurisdiction agreement, then:

- (a) the Courts of the Carrier’s domicile, or
- (b) the place of receipt stated in the contract of carriage, or
- (c) the place of delivery of the goods stated in the contract of carriage, or
- (d) the port of initial loading, or
- (e) the port of final discharge.

At the choice of the claimant.

- for actions against the maritime performing party,

⁵⁰ The entry into force of this convention would make the supply chain more complex and unwieldy and contribute to foster protectionism instead of free trade”. CLECAT, “*The European Freight Logistics and Customs Representatives*”, Position paper, May 2009.

⁵¹ “*The Rotterdam Rules will be difficult to understand for even the skilled ship operator or owner or charterer or shipper or consignee or receiver because they are so complicated. Even the skilled full-time maritime lawyer will have constant, important doubts of the meaning of the Rotterdam Rules*”. W. TETLEY, “*W.T.: Summary of some General Criticisms of the UNCITRAL Convention*”, November 2008.

- (a) the domicile of the maritime performing party, or
- (b) the port where the goods are received by the maritime performing party, or
- (c) the port where the goods are delivered by the maritime performing party, or
- (d) the port in which the maritime performing party performs its activities with respect to the goods.

At the choice of the claimant.

- for actions against the Shipper, in a competent Court designated by agreement between the Shipper and the Carrier.

58. Perhaps, the above jurisdictional venues could have been made simpler by granting a forum choice to the claimant: by exclusive agreement, in default of which the Carrier's domicile, or the place of receipt of the goods or the place of delivery (the port of loading and the ports of discharge for sea carriage only), in respect of actions in contract; and the domicile or the place in which the Defendant performs its activities with respect of the goods, for actions in tort.

59. Some difficulty may arise, under Articles 70 and 71, in connection with arrest or precautionary measures and consolidations of actions. In the event of the vessel being arrested and either the Arrest Conventions of 1952 or 1999 being in force in the Contracting State, then the provisions of such Arrest Convention regarding jurisdiction on the merits shall prevail (70.b). However, in the event of no Arrest Convention in force in that State, then the competent Courts in that Contracting State may have jurisdiction on the merits unless the Contracting State had made a declaration to the effect that it is to bound by Chapter 14 of the Convention, in which case they will have to abide by the rules of the Chapter. As regards, "provisional or protective measure" it must be understood that these relate to the ship and not to the cargo. The issue of consolidation of actions or amalgamation of proceedings would present two faces, namely, a single action brought against both the Carrier and the maritime performing party, in which case one of the non-exclusive venues shall be competent to hear either actions, but for the latter event of two separate actions being brought in different but correct venues under the Convention, the lawsuits could be amalgamated into the Court entrusted with the first action albeit the problems that may well arise where the lawsuits are commenced in two different States and one is not a Contracting State having made the declaration as to Chapter 14. The Convention also provides for removal, unless there is a binding agreement on exclusive choice of forum, of an action brought by the Carrier (by a maritime performing party it would be very unlikely) seeking a declaration of non-liability or any other action that would deprive a claimant of its right to select the forum under the Convention, once that the Defendant has made its choice of Court, in which the Carrier's former action may be recommenced. This provision has little ground because such a declaratory action may be addressed against the Shipper or one of his subcontractors, in respect of which no exclusive agreements are required, besides the fact that such declaratory action may be brought by the Carrier in respect of the localization of the loss or damage in a place that would render the Convention not applicable pursuant to Article 26 (this jurisdictional defence can be also raised by way of "declinatory" or challenging the jurisdiction chosen by the Plaintiff), and lastly because non-liability declaratory actions are usually admitted under the rules of due process and cannot be construed as intended for depriving any other party of a forum selection right, according to which such party may always acts first in Court.

60. Chapter 15 relating to Arbitration is also optional and presumed not applicable.⁵²

61. The choice of the arbitration venue follows a similar pattern to the one provided by the previous Chapter for jurisdiction, namely, the place agreed in the arbitration clause, in default of which (not "or") the domicile of the Carrier, the place of receipt of the goods, the place of delivery and the ports of loading or discharge(for marine carriage only). Oddly enough, there is no provision in the new rules requiring the arbitrators to apply the rules of the Convention, unlike the Hamburg Rules at Article 22.4, which would have otherwise made full sense for a declaration as to binding effect, or even will encourage Contracting States to make such declaration.

⁵² "The wider use of volume contracts together with voluntary provisions on jurisdiction and arbitration will result in a marginal application of the Convention, hampering international uniformity". M. FAGHFOURI, *IMMTA Newsletter*, January 2009.

62. Whether or not the Contracting States opt in for Chapters 14 and/or 15, the rules of procedure are dictated by the national law in force in the Contracting State to the effect that the domestic rules of process shall serve to vehicle the Convention provisions along the route to the Courts decision or the arbitral award, as the case may be. The Rotterdam Rules are considerably complex and flooded by reservations, distinctions, cross-references and back-and-forth readings which will not play usefully enough in the hands of adjudicators or will not, indeed, help making the proceedings run smoothly or quickly. Thus, a large number of preliminary and technical issues regarding application of the Convention, jurisdiction and title to sue can be expected because of the various exceptions and alternatives provided by the Convention itself. The practice of the evidence with regard to part-causes, main causes and concurrent causes, and particularly in that refers to discharging the rather special burden of proof suggested by Article 17 down the staircase to the issue of the exercise of due diligence, is likely to open up the way to endless objections and interlocutory challenges. Major issues of *litis pendens* and *res adjudicata* may present themselves in relation to actions against the Carrier and against the maritime performing parties, both at international and domestic levels. It may have been thought that by sticking closely to the Hague-Visby Rules greater advantage could be obtained from the abundant and settled caselaw accumulated during more than 80 years; that perception may not be too right when we consider that a great deal of the underlying navigation and technology as of 1924 is obsolete today and has been superseded by a much newer structure of the shipping business and of the vessels' designs and technologies, so that in countries of Civil Law the rules of law must be always construed to serve the purposes of the social and economical reality of the time in which they are to be applied. The Convention is hardly modern in that refers to the catalogue of the Carrier's obligations and to the list of exculpatory causes (still keeping the one of "fire on board") and in that relates to the limits of liability that were thought in 1980.

63. All of these factors, outlining the described complexity that would generate long and dragging processes, may not make the Convention an ideal tool for doing justice or resolving disputes in the hands of judges and arbitrators⁵³, who pursuant to the very Convention may not always be appointed in accordance with its rules of choice (no declaration in respect of Chapters 14 and 15).

XI. The Practical Needs the Convention is to Serve.

64. The new Convention geared by the UNCITRAL was intended to overcome, as a third option, the dilemma between the Hague-Visby and the Hamburg Rules.⁵⁴ I do not think that as regards the law on carriage of goods by sea that objective will be achieved as I am afraid that the Hague-Visby patterns will continue to be adopted by the majority, and those States which already have them will not adopt this Convention readily or promptly.⁵⁵ However, those non-European countries which do not worry about the conflict with the CMR⁵⁶ or CIM-COTIF⁵⁷ Conventions are likely to ratify the Rotterdam Rules, which

⁵³ "To sum-up, although the new Convention entails undoubtful progress in the regulation of the marine transport of goods, at the same time it shows throughout a fear, logical somehow, of not reaching sufficient acceptability. Thus, when it comes to deal with the fundamental issues more installed, and unjust, in the current law, it can be noted that it (the new Convention) does not generally step forward to solve them but handles them in an ambiguous manner". N. LÓPEZ SANTANA, *Revista de Derecho del Transporte*, at p. 347, 2008. (translation).

⁵⁴ There was general consensus at the outset of the 9th session that the purpose of the Working Group's work was to end the multiplicity of the regimes of liability applying to carriage of goods by sea and to adjust maritime transport law so as better to meet the needs and realities of international maritime transport practices". S. BEARE, "*The CMI/UNCITRAL project*", April 2002.

⁵⁵ "The current project by the CMI and UNCITRAL may well return the maritime nations to the uniformity they enjoyed shortly after the Hague Rules were enacted". L. K. RAMBUSCH, *Committee A News, IBA SBL*, May 2002.

⁵⁶ "It seems likely that the Uncitral Convention will at least cover the period that cargoes remain on the pier before loading and after discharge. However, it is not clear how Uncitral will handle land carriage under multimodal transport because of competing land carriage conventions like the CMR in Europe", V. M. DE ORCHIS, *Fairplay* 14 March 2002.

⁵⁷ The last revision of the International Convention concerning the Carriage of Goods by Rail (CIM) goes back almost 20 years. This revision was completed at the end of the Eighth Revision Conference (Bern, 30.4-9.5.1980) with the signing, on 9 May 1980, of the new Convention concerning International Carriage by Rail (COTIF).

together with the signature and impulse of the United States⁵⁸ (the new rules were to some extent made for them and for accommodating their Volume Contracts in lieu of passing another COGSA⁵⁹) will soon enter into force, probably by late 2011. Then, the shipping world will have three wet international instruments, namely, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules, but not a single Convention on multimodal transportation, which was generally accepted to be the real need for the market since the last quarter of last century.⁶⁰ The test and good running of the Convention in the law Courts remain unpredictable, as so is the success of the Convention. The market will gain a lot in strengthening Liner services and consolidating the trades around the world and short-sea, because the new rules are soft enough to please the large liner operators and tramp carriages will continue living in their discarded world of the charterparties and booking agreements looked after by English law and London arbitration (or Singapore)⁶¹. The Rotterdam Rules may not fit well into the Shippers' schemes and are unlikely to be welcome by them. Likewise, cargo insurers may think it twice in terms of burden of proof, legal costs ahead and unpredictability of solutions in regard of the localization of the loss or damage, and despite the gift of two-years time for their recovery suits.⁶² The Convention, most unfortunately, does not suit the needs of multimodal services and of the logistic chain, ignoring independent contractors of key importance such as the Logistics Operator and the International Terminal Operator. The advantages of the electronic transport records will be welcome, though these were to fly with the wind into a paperless era and did not alone justify a Convention. As a result, and partly due to the very restrictions and limitations of its own, let alone the lack of consensus reachable by the delegations to Working Group III, the magic and leading objective of uniformity may have not been served by leaving so many patches in the screen and providing piece-meal solutions to the transport users.

65. The political aims, nonetheless, will be achieved but every country or organization supporting this hard-laboured but complex Convention will know which of its own such is or may be in the middle or long run. A debate must now begin and in so doing the new rules will be best reviewed, and more examined and will become best known to their future class masters, namely, the law Courts.

⁵⁸ "We feel that controversial issues cannot be resolved on an individual basis. Successfully completing the present project will require commercial compromises in which the various affected industries can each achieve only some of their overall goals". PROPOSAL BY THE UNITED STATES OF AMERICA, (U.S. Position Paper), 11 July 2003.

⁵⁹ "The draft Convention does address many of the shortcomings of the current COGSA. But serious questions remain as to whether the draft convention will actually solve the problems. And where it does, will the Convention open a Pandora's Box of new issues for Courts to resolve?. Rotterdam contains a provision which could open the door for carriers to completely isolate themselves from the Convention", T. J. NAST, "*The Rotterdam Rules: A new day for Carriage of Goods by the Sea*", 2009.

⁶⁰ As a result, carriers and shippers in finding the scope of the Rotterdam Rules inadequate and incomplete will be forced to look to other conventions and other legal regimes to govern the transport contracts of their goods and their contracts. Thus, the Rotterdam Rules not only fail to create a uniform body of law for regulation of multimodal transport, but add to the complexity of existing multimodal transport regimes". W. TETLEY, "*A Summary of General Criticisms of the UNCITRAL convention (The Rotterdam Rules)*", December 2008.

⁶¹ "It is important to recall that national delegations each come with their own agenda. The carrier-friendly Hague Rules were created largely by the wealthy and powerful nations with their large navies and merchant fleets; many of these nations are still the bases for the large shipping lines and they retain an interest in protecting those industries; shipping nations generally are interested in increasing limitation amounts and removing defences". G. MAGRATH, "Rotterdam Rules: where we are and how got there". *Forwarderlaw.com*. May 2009.

⁶² "Now, theoretically, if the Rotterdam Rules are endorsed, it is natural that insurance premiums/deductibles for cargo risk (P&I) for shipowners and charterers increase, and the premiums/deductibles for traders' cargo insurance decrease. From a practical point of view it is, however, difficult to say what effects the new rules will have of course. Only time will tell". M. LINDFORS, "*Beacon*" – Skuld – Legal Issues, June 2009.